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No. 87-1173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

APPLICATION OF ADIRONDACK CHAIR CO., INC.,

Appellant,

v.

COMMISSIONER OF FINANCE,
OF THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST JUDICIAL DEPARTMENT

BRIEF OPPOSING MOTION TO DISMISS

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The Appellee, the Commissioner of Finance of the City of New York, rendered a decision that the Appellant, Adirondack Chair Co., Inc., was not entitled to allocate any part of its income outside of the City although it was "doing business" outside of the City by regularly storing inventories in other states from which deliveries were made to customers throughout the country since the place where the inventories were stored was neither a public warehouse nor a place of business that it maintained. (Decision of Commissioner of Finance,

Conclusions of Law D., E. and F., JS, 13a[1]). This decision was confirmed without opinion by the New York Supreme Court, Appellate Division, First Judicial Department and this appeal is taken from Order of such court. (JS, 15a) The Appellant then made a Motion For Leave To Appeal to the New York Court of Appeals which was denied without opinion. (JS, 17a)

In his Motion To Dismiss, the Appellee, in an attempt to preclude a review by this Court of the Constitutional issues involved herein, has raised a non-existent factual issue by erroneously stating that such decision was predicated on the fact that the Appellant did not maintain inventories outside of the State since it failed to prove that such merchandise was kept separate and identifiable by the bailee. To the contrary, the Appellee in its decision made numerous Findings of Fact and Conclusions of Law which clearly indicate that such merchandise was the property of the Appellant. (JS, 11a, 12a and 13a)

A. *The Appellees Assertion Of A Factual Issue As To The Ownership of Inventories Stored Outside Of New York Is Merely A "Red Herring" Which Is To Be Disregarded*

There never was any issue raised in this matter by the Appellee as to the ownership of such inventories, either at the Formal Hearing or in his decision (JS, 9a to 14a). There is not one Finding of Fact or Conclusion of Law in said decision, indicating that the Appellant did not regularly store its inventories outside of the State. It was stated therein that the issue involved in the Formal Hearing, was:

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[1]JS refers to Appellant's Jurisdictional Statement and number is the page thereof.

> "I. Whether the out-of-city plants of Adirondack Chair Co., Inc.'s furniture suppliers, at which petitioner kept inventory, constituted regular places of business of Adirondack so as to permit the allocation of business income." (Emphasis supplied.)

That is a clear acknowledgement by the Appellee that the Appellant maintained inventories outside of the City. Moreover, since inventories are an income determining factor,[2] the taxable income of the Appellant would have had to have been adjusted to exclude from the computation thereof, any amounts attributable to merchandise which was found not to be the property of the Appellant and no such adjustment was made. There never was any question, allegation or finding that such inventories were not the property of the Appellant either at the Formal Hearing or in the decision, thereon.

Not only was there no question as to the ownership of such inventory but there were numerous statements in the decision indicating the Appellant's ownership thereof. In Findings of Fact 11 and 12 (JS, 11a and 12a), it is clearly stated that the Appellant "purchased" the inventory stored at the supplier's premises:

> "11. During the audit period, petitioner regularly purchased office furniture from Overman, U.S.A. in order to have a supply of items constantly in demand on hand. Overman sent petitioner invoices which

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[2]Regulation §1.471-1 under §471 of the Internal Revenue Code (26 U.S.C. §471), "Need for inventories - In order to reflect taxable income correctly, inventories at the beginning and end of each taxable year are necessary in every case in which the production, purchase or sale of merchandise is an income-producing factor."

noted that items were purchased for stock. Adirondack would pay the invoiced amount. When it received an order, Adirondack would issue an invoice to Overman to ship merchandise to Adirondack's customers. Each month, Overman would write to Adirondack regarding orders which had been shipped and listing Adirondack's stock in Overman's warehouse.

12. Petitioner failed to adduce any evidence that the merchandise purchased from Overman was stored in space rented by petitioner or that the merchandise was otherwise kept separate or identifiable. (Emphasis supplied.)

Under §1-201(32) of the New York Uniform Commercial Code the term "purchase" "includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property".[3] (Emphasis supplied.) Thus, a "purchase" is the acquisition of an interest in property. Under §2-105(2) N.Y.U.C.C. "goods must be both existing and identified before any interest in them can pass.***" Thus, when the Appellee stated that the Appellant purchased merchandise it must be assumed that he was knowledgeable that such term, as defined by the laws of this State, means that the Appellant had a property interest in the inventories and that, of necessity, to have acquired such interest, the inventories must have been in existence and identified.

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[3]Although the inventories involved herein were purchased and stored outside of New York, the various terms should be defined by reference to the laws of the State of New York, since the tax is imposed under the authority of the laws of such State. Furthermore, while the Appellee must be knowledgeable of the New York Uniform Commercial Code, he cannot be expected to know the laws of other states.

The only references to the words "separate" and "identifiable" in the entire decision are made in Findings of Fact 12 and 13 of the Appellee's decision. (JS, 12a) Both of these Findings clearly state that the Appellant owned the merchandise stored at the sites of the suppliers but that there was no evidence that the Appellant's property was kept separate or identifiable. This reference to "separate and identifiable" is to the storage of the inventories and not as to fact of ownership. Whether or not such inventories were kept in a separate space or were otherwise segregated, is of no importance since the bailees could not have terminated the Appellant's property interest therein by failing to segregate such property.[4]

At the Formal Hearing of the Appellee and in his decision, he always acknowledged and admitted that the Appellant stored its inventory outside of New York. It is the ownership of such inventory that gives rise to the Constitutional issues involved herein. The decision of the Appellee was that the Appellant was not entitled to an allocation as being engaged in a multi-state business although it made sales of merchandise to customers outside of New York from inventories which were also stored outside of the State. The Appellee has invented a factual issue as to ownership of the property stored outside of New York as a "red herring" to prevent this Court from deciding the important Constitutional issues involved herein. The Appellee's decision was predicated solely on basis that the inventories were stored at the warehouse of suppliers which were not public warehouses.

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[4]Since there was a finding in Finding of Fact 11 (J.S., 11a) that there was a monthly listing of "Adirondack's stock in Overman's warehouse", it would seem there must have been some segregation or identification of the "stock" to permit the preparation of such listing.

B. *This Court Has Jurisdiction Since Constitutional Issues Are Federal Questions*

The Appellee contends that this Court does not have jurisdiction in this matter since there was no determination as to any Constitutional issue in the New York Courts. Inasmuch as the New York Courts, respectively, confirmed the decision of the Appellee without opinion and denied the Motion For Leave To Appeal, again without opinion, no one knows whether or not there was a determination as to any issue. Accordingly, the Appellant could not (as stated by the Appellee, at page 14 of its Motion To Dismiss) argue in its Jurisdictional Statement that "the New York courts based their decisions on a constitutionally impermissible distinction between different types of warehouses." It was the Appellee who made such distinction in his decision -- it was not the decision of the courts. The silence of the courts is indicative of nothing. It is certainly presumptuous on the part of the Appellee, to suggest that the Courts must have sustained his decision solely on the basis of the factual findings because this was his sole argument in his brief before the Appellate Division (Appellee's Motion To Dismiss, page 13).

The Appellant contended that there were constitutional issues involved in this matter, in both its brief and reply brief in the Appellate Division and the arguments with respect thereto consumed about 20% to 25% of the space of the arguments therein. In the affidavit attached to the Motion For Leave To Appeal to the New York Court of Appeals, approximately 20% to 25% of the space therein was devoted to the Constitutional issues. The mere fact that the Appellant did not request such appeal as a matter of right because of the constitutional issues asserted to be involved, does not mean that the Court of Appeals did not consider such issues. The Appellant made its

constitutional arguments in its Motion and the Court could have found that there were such issues. (See *American Chicle Company v. State Tax Commission*, 8 N.Y.2d 1119 (1960)). Instead, the Court denied the Motion without opinion.

It is clear that the Appellant has in every state court raised the Federal issue. "The issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts." *(Street v. New York,* 394 U.S. 576, 583, 1969) Thus, it would appear that since the issue was raised in the state courts and any question as to whether such issue was "sufficiently and properly" raised is a Federal question, there is no basis for the Appellee's contention that this Court lacks jurisdiction because of the failure of the New York Courts to make a determination of the Federal issue.

In view of the fact that there are no factual issues involved in this matter and there are substantial Federal questions due to the failure of the Appellee to recognize that the Appellant is engaged in interstate commerce and in fact "doing business" in several states, this Court should grant this appeal.

Respectfully submitted,

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